

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2003 Session

LILLIAN ANNETTE MUMFORD v. JOE LESLIE MUMFORD

Appeal from the Circuit Court for Knox County
No. 85825 Bill Swann, Judge

FILED JULY 14, 2003

No. E2002-01338-COA-R3-CV

After five years of marriage, Lillian Annette Mumford (“Wife”) filed for a divorce from Joe Leslie Mumford (“Husband”). Husband also filed for a divorce. The Trial Court bifurcated the trial separating the issues of divorce and property division. During the first portion of the bifurcated trial, the Trial Court heard fault proof and in its order entered March 19, 2002, found that both parties were entitled to a divorce and declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129. Wife appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Douglas J. Toppenberg, Knoxville, Tennessee, for the Appellant, Lillian Annette Mumford.

Joe Leslie Mumford, Knoxville, Tennessee, pro se Appellee.

OPINION

Background

Husband and Wife were married in 1995. There are no children of this marriage. In July of 2000, Wife filed a complaint for divorce in the Fourth Circuit Court for Knox County (“Trial Court”). A few days later, Husband filed a complaint for divorce in the Chancery Court for Knox

County. Husband's complaint was transferred to the Trial Court and treated as a counter-complaint by order entered in August of 2000.

The record both reflects serious acrimony between the parties and is replete with allegations of different types of misconduct. Each of the parties has accused the other of doing such things as spray painting obscenities on the interior walls of the parties' home, keying the other's car, stealing the other's personal belongings, fraudulently obtaining credit cards in the other's name then running up balances and refusing to pay in order to ruin the spouse's credit rating, and even firing shots at the other.

The record further shows numerous discovery disputes. In May of 2001, the Trial Court entered an order appointing a special master to handle discovery matters. Disputes regarding discovery continued. In July of 2001, Wife filed a motion for default judgment requesting the court to dismiss Husband's counter-complaint due to Husband's alleged failure to cooperate in the discovery process. In September of that year, Husband filed a motion requesting the court to grant separate trials for the divorce and the division of property, claiming that Wife was engaging in tactics solely for the purposes of delaying the divorce.

The Special Master heard testimony and then filed his report in October of 2001. In that report, the Special Master found there was "much animosity and ill-will between the parties" that had "spilled over into the discovery process between counsel for the respective parties," but that the failure of the discovery process was "a direct result of the actions, or lack thereof, of the parties themselves." The Special Master also found that although Husband was not without fault in frustrating the discovery process, the Wife had "set about an intentional and unwavering pattern of frustrating the discovery process." The Special Master did not find that the granting of a default judgment was the proper remedy for Wife's failure to cooperate with discovery requests in this case, but did recommend that judgment be entered requiring Wife to pay to Husband \$800 in attorney fees for her failure to cooperate. The Special Master also stated all discovery requests should be fully answered by Wife.

Wife filed exceptions to the Special Master's report within the ten day period allowed by Tenn. R. Civ. P. 53 seeking a *de novo* hearing because, among other things, the Special Master did not set forth specific findings to support the conclusions in the report and the report was filed nearly three months after the hearing and not, Wife alleged, "with all reasonable diligence" as required by Rule 53. Tenn. R. Civ. P. 53.03. In December of 2001, the Trial Court entered an order holding that the issues of divorce and of the equitable distribution of property would be tried separately. The December order set a date certain for the trial of the divorce issues "without any further delays by either party." The order also dismissed Wife's motion taking exceptions to the Special Master's report and ordered Wife to comply with the Special Master's findings.

On December 10, 2001, during a pretrial conference, Wife argued to the Trial Court that the findings contained in the Special Master's report were not specific enough to inform the parties of what each was expected to do. The Trial Court reviewed the report and agreed. The Trial

Court in its Trial Management Order entered January 23, 2002 remanded the matter to the Special Master for more specific findings.

On January 28, 2002, the Special Master filed an amended report specifically delineating which discovery requests needed to be complied with and reconfirming his prior recommendation that judgment be entered against Wife in favor of Husband in the amount of \$800 for attorney fees. On February 12, 2002, outside the ten day period allowed by Tenn. R. Civ. P. 53, Wife filed objections to the amended Special Master's report.

On March 12, 2002, the Trial Court held the first portion of the bifurcated trial, which dealt solely with the issue of divorce. Wife requested a continuance claiming she had suffered a fall and visited the emergency room the night before. The Trial Court granted a continuance for the portion of the trial dealing with property issues, but refused to grant a continuance on the issue of divorce.

Prior to hearing proof, the Trial Court announced it intended "to receive only sufficient fault proof today to pass upon the sufficiency of grounds to pronounce a divorce to either or both sides." The Trial Court further stated it would "honor parties' religious practices if they need to . . . find the other side blameworthy," but would not "litigate fault cases for the joy of fault cases." Counsel for Wife indicated he did not know of any "religious factors in play here," but stated the parties were both members of a small community in Kentucky and wanted a ruling regarding fault.

The Trial Court heard testimony from both Husband and Wife, but urged counsel to keep the proof brief and after testimony began stated that the fault proof would be "roughly five minutes on a side." The Trial Court also noted that neither party alleged spousal support issues and therefore, fault was not necessary for a support determination. After hearing brief testimony from both parties, the Trial Court pronounced the parties divorced. In its order entered March 19, 2002, the Trial Court found that both parties were entitled to a divorce and directed entry of a final order as to the issue of divorce finding no just reason for delay pursuant to Tenn. R. Civ. P. 54.02.

Discussion

Although not stated exactly as such, Wife raises three issues on appeal: 1) whether the Trial Court erred in refusing to hear her exceptions to the amended Special Master's report; 2) whether the Trial Court's policy of refusing to hear discovery disputes prior to trial as based upon the Trial Court's *Turner v. Turner* rule violated Wife's procedural due process rights; and 3) whether the Trial Court's limitation on the amount of fault proof presented during the first part of the bifurcated trial violated Wife's procedural due process rights. We will address each issue in turn.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of

law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We begin by considering whether the Trial Court erred in refusing to hear Wife's exceptions to the amended Special Master's report. In substance, Wife complains that the discovery disputes, specifically Husband's failure to comply with Wife's discovery requests, were not properly addressed in the amended Special Master's report. As such, Wife argues she was hindered in her ability to produce evidence to prove Husband's fault during the first portion of the bifurcated trial, which concerned only the issue of whether to grant a divorce.

We need not decide whether or not it was error for the Trial Court to refuse to hear Wife's exceptions to the amended report because, even if it was error, it was harmless. Considering the record as a whole, the Trial Court's refusal to hear the exceptions, even if error, did not involve a substantial right that more probably than not affected the judgment or resulted in prejudice to the judicial process. *See* Tenn. R. App. P. 36(b). Wife complains this alleged error hindered her ability to prove grounds for divorce by showing Husband's fault. However, Wife at trial satisfied her burden of proving Husband at fault. The Trial Court found that both Husband and Wife were at fault when it determined that both were entitled to a divorce. Wife's attorney told the Trial Court that they wanted a ruling regarding fault. Wife received such a ruling when the Trial Court found that both parties were entitled to a divorce. Clearly the alleged error in no way hindered Wife's ability to prove Husband's fault as the Trial Court found Husband, as well as Wife, to be at fault. Since the claimed error by the Trial Court in refusing to hear the exceptions did not involve a substantial right that more probably than not affected the judgment, we will not set aside the Trial Court's order on this issue.

We next consider whether the Trial Court's policy of refusing to hear discovery disputes prior to trial based upon the Trial Court's *Turner* rule violated Wife's procedural due process rights. Our ability to consider this issue is hindered by the fact that Wife did not provide this Court with a copy of the Trial Court's *Turner* decision about which Wife complains. As such, we are unable to make any determination about whether the Trial Court's *Turner* rule violates Wife's due process rights because it is, at best, unclear what this *Turner* rule is. Further, we note that the substance of Wife's complaint regarding this issue again deals with problems in obtaining discovery from Husband hindering Wife's ability to prove grounds by showing Husband's fault. As we discussed above, Wife successfully proved that Husband was at fault, and the Trial Court so held. Therefore, the Trial Court's refusal to hear certain discovery disputes prior to trial, even if error, did not involve a substantial right that more probably than not affected the judgment or resulted in prejudice to the judicial process. *See* Tenn. R. App. P. 36(b). The Trial Court's refusal to hear certain discovery disputes prior to trial, even if error, was harmless, and we will not set aside the Trial Court's order on this basis.

We next consider whether the Trial Court's limitation on the amount of fault proof presented during the first portion of the bifurcated trial violated Wife's procedural due process rights. The first portion of the bifurcated trial dealt solely with whether the parties would be granted a

divorce. All other issues were reserved for the second portion of the trial and are not before us in this appeal.

Tenn. Code Ann. § 36-4-129 provides:

The court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

Tenn. Code Ann. § 36-4-129(b) (2003).

The statute, by its own terms, empowers courts upon sufficient proof of any ground for divorce to declare the parties divorced regardless of who may be at fault. “[P]roof of grounds by either party authorizes the court to declare the parties divorced instead of awarding the divorce to one of the parties.” *Hill v. Hill*, No. M2001-01016-COA-R3-CV, 2002 Tenn. App. LEXIS 905, at *9 (Tenn. Ct. App. Dec. 23, 2002), *no appl. perm. appeal filed*. “[T]here is certainly no requirement of a written finding by the trial court that both parties were at fault or which party was less at fault.” *Varley v. Varley*, 934 S.W.2d 659, 665 (Tenn. Ct. App. 1996).

The Trial Court heard testimony, however brief, from both parties and declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129. The Trial Court, in its order entered March 19, 2002, found that both parties were entitled to a divorce. The evidence does not preponderate against this finding.

Since Tenn. Code Ann. § 36-4-129 gives trial courts the power to grant a divorce “if either or both parties are entitled to a divorce,” the Trial Court only needed to hear sufficient proof during the fault portion of the trial to determine if the parties were entitled to a divorce. Any further proof beyond that would have been cumulative and needless. Tenn. R. Evid. 403 specifically states a court may exclude relevant evidence if presentation would be a “waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403. The Trial Court in this bifurcated trial was not required to make a written finding as to “which party was less at fault.” *Varley*, 934 S.W.2d at 665.

We fail to see how limiting the fault proof during the first portion of the bifurcated trial violated Wife’s due process rights. Wife did have an opportunity to be heard. Wife presented sufficient proof to satisfy her burden of proving grounds for divorce by showing Husband’s fault. Wife wanted a divorce and the Trial Court granted a divorce. Further, we note that at trial Wife requested a ruling on fault and in its order entered March 19, 2002, the Trial Court did just that when it found that both parties were entitled to a divorce, and thus, both were at fault. Having found both Husband and Wife to be at fault, the Trial Court exercised its discretion pursuant to Tenn. Code Ann. § 36-4-129 and declared them to be divorced rather than awarding a divorce to either Husband or Wife alone. We hold that the Trial Court properly exercised its discretion by excluding cumulative

evidence, and by declaring the parties divorced rather than awarding a divorce to either party alone. We, therefore, find no error and affirm.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellant, Lillian Annette Mumford, and her surety.

D. MICHAEL SWINEY, JUDGE